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August 3, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Re: NeuStar Request (CC Docket No. 92-237)*

Dear Ms. Dortch:

This letter is filed on behalf of Syniverse Technologies ("Syniverse") in response to NeuStar Inc.'s ("NeuStar") letter of July 28, 2004, in the above-referenced proceeding.[1] In this latest letter, NeuStar focuses primarily on one of Syniverse's concerns with the relief requested by Neustar in its April 14, 2004 letter: that relieving NeuStar from the prior approval requirements that assure compliance with the NANPA "neutrality obligations" would, under Federal procurement regulations, require the Commission to issue a new solicitation for the NANPA role rather than exercising the second option year provided in the NANPA contract.[2] As demonstrated in the attached letter from J. Randolph MacPherson, a partner in the Washington, D.C. office of the law firm of Halloran and Sage with over thirty years of experience in government contracts matters involving telecommunications issues, NeuStar's arguments continue to ignore the most crucial facts as well as the proper application of FAR §17.207 regarding the exercise of options in Federal contracts. As Mr. MacPherson appropriately concludes:

> "FAR §17.207(c) and (d) prescribe the procedures to be followed regarding the exercise of options, and should the FCC grant the relief requested by NeuStar the scope of the competitive market for the NANPA will be changed substantially. Under such circumstance, the only reasonable approach would be for the Commission to use the very competitive market forces it has brought to bear elsewhere in the telecommunications marketplace to ensure the best price and most advantageous offer is obtained, as is required by applicable Federal procurement regulations."

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1 Ex parte letter from Richard E. Wiley, counsel to NeuStar, dated July 28, 2004 (CC Docket No. 92-237) ("NeuStar July 28 letter").

2 *See* ex parte letter of Lawrence J. Movshin, counsel to Syniverse, dated July 26, 2004 (CC Docket No. 92-237).

NeuStar's July 28 letter also continues to minimize the relief sought, despite the concerns raised in the record by Syniverse and others.[3] For example, NeuStar consistently describes removal of the prior approval requirement for ownership and board changes as "the minor procedural relief sought in NeuStar's request,"[4] or the "limited procedural relief NeuStar seeks."[5] Of course, the scope of the relief sought is hardly limited or minor – the requirements at issue were a fundamental element of the Commission's determination that NeuStar could retain the NANPA contract in 1999 when Warburg took ownership of it. When the NANPA contract was bid three years later, these restrictions were an important element affecting the competitiveness of that bidding process. It is folly for anyone, much less NeuStar, to argue that removal of this requirement, granting it the ability to enter the IPO market with the NANPA contract as a centerpiece of its portfolio, is merely a "minor" modification of the contractual provisions.

Similarly, it defies reality for NeuStar to argue that the removal of a prior approval requirement on any type of private or public financing is "not likely" to "result in a materially more advantageous deal for the government should the contract be rebid."[6] The record in this proceeding suggests that Syniverse, at least, believes that the ability to go to the public market and/or modify its management structure without prior Commission approval would make a significant difference in its consideration of whether to bid for the NANPA contract, and there is no reason to believe that Syniverse is alone in this view. No less significantly, it is clear that NeuStar hopes to capture significant value from its role as NANPA in its sale of equity to the public. Thus, NeuStar's suggestion that the potential value to be captured is immaterial is at best self-serving. Indeed, if the potential change in the value of the contract is so minimal, then NeuStar should have no objection to terminating the contract and allowing it to be re-bid *before* NeuStar enters the IPO marketplace and retains that value for its current owners.

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[3] Parties raising concerns are not limited to other potential competitors for the contract; they include carrier constituencies that could be most affected by the potential loss of oversight over the composition of the ownership and governance of the NANPA. *See, e.g.,* ex parte letter from David L. Nace, counsel to Rural Cellular Ass'n, dated July 29, 2004 (CC Docket No. 92-237).
[4] NeuStar July 28 letter at 1.
[5] NeuStar July 28 letter at 2.
[6] NeuStar July 28 letter at 2.

As Syniverse consistently has argued throughout this proceeding,[7] the Commission may only grant NeuStar's requested relief, and increase the value of the NANPA contract, if it captures the increased value for the government and the industry via a new procurement. It can do so by declining to exercise the option to renew the contract at the end of the current option year. Alternatively, NeuStar may continue to serve as NANPA through all of the renewal periods under the current contract terms, which in no way impede NeuStar's performance of its NANPA responsibilities.

Sincerely,

WILKINSON BARKER KNAUER, LLP

By: /s/
Lawrence J. Movshin

Enclosure

cc (via email): Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Daniel Gonzalez
Scott Bergmann
William Maher
Diane Griffin
Vickie Robinson
Cheryl Callahan
Sanford Williams
Pam Slipakoff
Debra Weiner
Neil Dellar

[7] *See, e.g.,* ex parte letter from L. Charles Keller, counsel to Syniverse, dated June 28, 2004 (CC Docket No. 92-237). NeuStar's mischaracterization of Syniverse's objections as a "novel argument raised at the eleventh hour" that should be "wholly ignored," NeuStar July 28 letter at 1, 4, is a frantic attempt by NeuStar to avoid the valid and serious issues that Syniverse has raised.

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August 3, 2004

Lawrence J. Movshin, Esq.
Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 700
Washington, D.C. 20037

Re: *NeuStar Request (CC Docket No. 92-237)*

Dear Mr. Movshin:

This letter responds to your request for an analysis of the Federal procurement matters discussed in NeuStar Inc.'s ("NeuStar") letter of July 28, 2004, to the Federal Communications Commission in the above-referenced proceeding. In that letter NeuStar asserts that the Federal Communications Commission ("Commission" or "FCC") should ignore the matters discussed in Syniverse's July 26, 2004 letter wherein it was explained that if the relief requested by NeuStar is granted, applicable Federal procurement regulations will require the FCC to issue a new solicitation for the NANPA work, rather than exercising the second option year provided for in the NANPA contract. NeuStar's July 28 letter asserts there is no basis to conclude the relief it seeks "will materially influence the price offered by competitive bidders for the NANPA contract" and that any potentially decreased prices "would not outweigh the costs of conducting a new procurement and transitioning the contract to a new entity." NeuStar also claims that merely by evaluating and including the options in the NANPA contract, along with the standard Federal Acquisition Regulation ("FAR") clause 52.217-5 entitled "Evaluation of Options", the FCC "has already made a tentative decision that such costs and disruptions are best avoided and that the option will likely be exercised." In my opinion, NeuStar's arguments continue to ignore the most crucial facts as well as the proper application of FAR §17.207 regarding the exercise of options in Federal contracts.

Initially, it merits emphasis that FAR §17.207(c) itself, and the Government Accountability Office in its bid protest decisions, make it clear that the determination of whether exercising an option is in the best interest of the government must "be made each time an option is exercised, taking into account the particular circumstances existing at the time."[1] The facts pertinent to exercise of option year 2 of the NANPA contract are not, therefore, the state of the market in 2002 when that contract was awarded, or even the market that exists today before action on NeuStar's request. Rather, the facts pertinent to the FCC's exercise of option year 2 will be the state of the competitive market for the NANPA work <u>after</u> action upon NeuStar's request. When the NANPA Solicitation

[1] *AAA Eng'g and Drafting, Inc.*, B-236034.2, March 26, 1992, 92-1 CPD ¶307, at 3.

("RFP") was issued in October 2002, Section H.6.B thereof (and Section 1.4 of the NANPA Technical Requirements Document at Attachment A to the RFP) made it clear that offerors had to comply with the FCC's specified neutrality requirements and implementing rules; that offerors had to certify they were in compliance with such criteria and rules as they then existed; and that any situation affecting such compliance had to be reported to the Commission. The ground- rules of the procurement thus were clear, and as Syniverse has explained previously in its July 26, 2004 letter to the FCC, Syniverse and other entities were unable to participate in the NANPA procurement because they could not comply with the neutrality criteria as then established and interpreted by the Commission. It is evident, therefore, that if the FCC chooses to grant NeuStar's requested relief, then the scope of potential competitors for the NANPA work will be broadened significantly with the natural result being increased competition and the availability of more advantageous offers and prices. Moreover, NeuStar's letter offers no support for its assertion that additional competition will not "equate to a material decrease in the price offered for the contract", which is inconsistent with what has occurred in the telecommunications marketplace over the last decade or more.

The difference in the scope of the competitive market that would result from grant of the relief requested by NeuStar, and the provisions of the NANPA RFP, also demonstrate why the four Federal procurement protest decisions relied on by NeuStar are inapposite. *Alice Roofing and Sheet Metal Works, Inc.*, B-283153, Oct. 13, 1999, 99-2 CPD ¶70, involved a losing bidder's challenge to the exercise of an option in a circumstance where the quantities of work actually had decreased significantly, thereby tending to support the agency's determination that a solicitation likely would not result in lower prices. There was no change in the scope of the competitive market itself. *Sippican, Inc.*, B-257047.2, Nov. 13, 1995, 95-2 CPD ¶220, also involved a losing bidder's challenge to the Navy's exercise of a third option within 14 months of the initial contract award, which was based in part upon a specific finding there was no known change in the current market. Again, this contrasts with the scope of the NANPA market if NeuStar's request is granted. While *Washington Consulting and Management Associates, Inc.*, B-243116.2, July 19, 1991, 91-2 CPD ¶76, did involve a protest by an entity which did not participate in the original procurement, it also was a circumstance where the protester's president was the former project director for the entity holding the contract with the Government. As a result, the protestor became a competitor to the contractor and was challenging the exercise of a second contract option with its president's former employer. Originally, 140 firms also had been solicited with only 3 responses, and in that circumstance the contracting agency conducted only an informal price analysis as required by FAR 17.207 (d)(2) because there had been no material change in the market. Finally, *Phoenix Air Group v. United States*, 46 Fed. Cl. 90 (2000), involved a subcontractor's challenge to the Navy's exercise of an option to acquire training flight services under a prime contract, where the primary issue was the scope of that contract and the subcontractor's concern was that exercise of the option required the provision of services at a financial loss. The scope of the competitive market was not at issue, and the Navy's contracting officer had exercised the option based in significant part upon a finding there "would be considerable cost savings to the

Government due to the continuity of operations and savings in administrative costs...". Id. at 107. While NeuStar relies upon Phoenix in support of its argument that any decreased price for the NANPA contract would not outweigh the costs of conducting a new procurement and transitioning the contract to a new entity, such assertion is belied by the NANPA RFP itself. Objective review of the 2002 NANPA RFP shows that major changes would not be required to conduct a new procurement. More importantly, Attachment B to the NANPA Solicitation was a detailed "Second Revised Transition Plan" prepared by NeuStar as required by its initial NANPA contract. A similar Transition Plan was and is required by Sections 2.15.4 and 10.12 of the NANPA Technical Requirements Document at Attachment A to the RFP, which is included in the current NANPA contract. In light of the previous NANPA Transition Plan, and the current contractual requirement for NeuStar to "provide a detailed plan for an efficient and orderly transition" 180 calendar days before contract termination, it is apparent that any costs of transition of the NANPA contract from NeuStar to a successor entity would be minimal. Moreover, in competitive Federal procurements it is not unusual for bidders to "subsidize" any such costs in their price proposals. Thus, NeuStar's assertion there would be considerable costs of conducting a new procurement and transitioning the contract to a new entity are contradicted by the terms of the NANPA solicitation and contract.

Finally, NeuStar's argument that the mere presence of the FAR §52.217-5 clause in the NANPA RFP reflects a "tentative decision" the option likely will be exercised is both disingenuous and incorrect. Review of the NANPA RFP reveals that in addition to including the FAR §52.217-5 clause in section M.6, at section M.1 the FCC included the FAR §52.217-3 clause "Evaluation Exclusive of Options", the FAR §52.217-4 clause "Evaluation of Options Exercised At Time of Contract Award", and the FAR §52.217-5 clause again. Section 17.208(a) of the FAR states that the FAR §52.217-3 clause is to be used when the FAR §52.217-4 and -5 clauses are not used. 48 C.F.R. §17.208(a). Section 17.208(b) of the FAR further states that the FAR §52.217-4 clause is to be used when "the contracting officer has determined that there is a reasonable likelihood that the option will be exercised, and the option may be exercised at the time of contract award". 48 C.F.R.§17.208(b). On their face, the inclusion of all 3 option clauses (which are at least in part mutually exclusive) in the NANPA RFP reflects only confusion, and not any "tentative decision" to exercise or not exercise the 4 option years. Moreover, the purpose of such clauses is merely to alert offerors whether their option prices will or will not be evaluated for price comparison purposes, and in no way reflects a "tentative decision" to exercise an option because the costs of a further procurement or disruption are best avoided. Those elements are assessed only at a later time as part of the determination required by FAR §17.207(c) and (d) regarding whether or not to exercise each particular option.

In summary, the FCC should not be misled by NeuStar's assertions that the relief of it seeks will not materially influence the price for the NANPA contract, and that any cost savings will be outweighed by the costs of a new procurement and transition of the contract. FAR §17.207(c) and (d) prescribe the procedures to be followed regarding the exercise of options, and should the FCC grant the relief requested by NeuStar the scope of the competitive market for the NANPA will be changed substantially. Under such circumstance, the only reasonable approach would be for the Commission to use the very competitive market forces it has brought to bear elsewhere in the telecommunications marketplace to ensure the best price and most advantageous offer is obtained, as is required by applicable Federal procurement regulations.

Sincerely,

J. Randolph MacPherson

577440-1(HSFP)

**J. Randolph MacPherson**
**HALLORAN & SAGE LLP**

J. Randolph MacPherson is a partner in the Washington, D.C. office of Halloran & Sage LLP. He practices in the administrative and regulatory, business and commercial, construction, and commercial litigation areas.

Mr. MacPherson represents construction contractors, equipment manufacturers, telecommunications carriers, computer and software suppliers in a wide range of government contracting, legislative, and federal regulatory matters. He also represents various customers of telecommunication services in negotiating service contracts with providers of telecommunication services and equipment. He has counseled national and local businesses in planning for and organizing to enter government markets, including the establishment of government services divisions or separate subsidiaries. He has assisted clients in preparing proposals; pre-award contract negotiations; preparation and submission of contract claims or change proposals; and compliance with auditing, accounting, socioeconomic, procurement integrity, and industrial security requirements. Mr. MacPherson has substantial experience in bid protests and contract appeals litigation having successfully represented clients in 1988-2003 before Federal agencies, the General Services Administration Board of Contract Appeals, the General Accounting Office, the Armed Services, Department of Agriculture, and Department of Housing and Urban Development Boards of Contract Appeals and in Federal and State courts.

Before joining Halloran & Sage in October 2003, Mr. MacPherson was a partner in the Washington, D.C. offices of Thelen, Marrin, Johnson and Bridges (1988-1993) and Sullivan & Worcester (1993-2003) and served for 16 years as an attorney in the United States Army and Department of Defense, (1972-1987). During his Government service, Mr. MacPherson served as a trial attorney representing the U.S. Government as a consumer of telecommunications services in numerous proceedings before the Federal Communications Commission and State regulatory entities and became the Chief Regulatory Counsel – Telecommunications for the Department of Defense in 1981. From 1981-1987, Mr. MacPherson was the primary legal advisor to the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD-C3I) and to the Director of the Defense Communications Agency (now known as the Defense Information Systems Agency) on telecommunications contractual, regulatory, legislative and judicial matters, and served as legal counsel to the President's National Security Telecommunications Advisory Committee (NSTAC). Mr. MacPherson completed his government service in 1987 as a member of the Federal Senior Executive Service.